

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BILL MARKER**

Claimant

VS.

**CONTINENTAL BAKING COMPANY/  
INTERSTATE BRANDS CORPORATION**

Respondent

AND

**KEMPER INSURANCE COMPANIES**

Insurance Carrier

Docket No. 211,782

**ORDER**

Respondent and its insurance carrier appeal from a July 23, 1996, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

**ISSUES**

- (1) Whether claimant provided timely notice of accident pursuant to K.S.A. 44-520.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds that the Administrative Law Judge's Order should be affirmed.

On March 4, 1996, while working for respondent, claimant was unloading racks of bread from the back of his truck onto the dock. One of the wheels unlocked and the rack began to tip. Claimant grabbed the rack and pulled it back, whereupon, he felt a stinging sensation in the right side of his stomach, below the belt and above the groin area.

He continued working the rest of that day. That evening he went to his family physician, Dr. Rumulo D. Magsalin. Claimant was told that he strained or pulled a muscle or possibly had a hernia. Dr. Magsalin referred claimant to James E. French, M.D., a board-certified general surgeon. Claimant was examined by Dr. French on March 11, 1996, at which time a right inguinal hernia was diagnosed. Surgical repair was recommended. Claimant was to consider his options and was released to return to work without restrictions.

Claimant's symptoms worsened and he returned to Dr. French on May 2, 1996. In his progress note, which is Claimant's Exhibit 2 to the preliminary hearing transcript, Dr. French reported the following:

"Since our last visit, he indicates the mass has persisted and is possibly slightly larger. It continues to be sore. It is bothering him increasingly with prolonged standing activities, as well as lifting, pushing and pulling."

Dr. French's assessment was of a "symptomatic right inguinal hernia, progressing" and surgical repair was again recommended to be performed "at a convenient time in the near future due to progressive symptoms." Claimant underwent surgery on July 2, 1996. His last day worked was June 21, 1996. He did not miss any work from this injury prior to his taking off for the surgery.

Claimant alleges an accident date of March 4, 1996, and each work day thereafter. It is stipulated that notice was not given to the employer until May 1, 1996. The Administrative Law Judge found the claim to be compensable based upon just cause. This finding was based upon "a clear conclusion that this gentleman had a very real fear that if he would have reported this as a work-related injury right away it would cause him problems at work."

The Administrative Law Judge also found that "even if he [claimant] didn't have just cause he reported it within time as his condition deteriorated each and every working day thereafter."

The record, as it currently exists, supports a finding of an each and every day worsening of claimant's condition. Accordingly, the May 1, 1996, notice of accident was timely. Respondent argues that the statements and the records of Dr. French are not objective findings, but instead are a restatement of claimant's own subjective complaints. As such, they are not persuasive evidence of an aggravation. Be that as it may, the record in this regard is uncontroverted. The uncontroverted testimony of the claimant cannot be ignored. There is no indication provided in the record that claimant's injury was caused or aggravated by anything other than his employment. Anderson v. Kingsley Sand & Gravel, Inc., 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976) holds that:

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."

Based upon the evidence presented, the Appeals Board finds claimant sustained injury by accident on March 4, 1996, and each and every day worked thereafter. The preliminary hearing Order by the Administrative Law Judge should, therefore, be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the July 23, 1996, preliminary hearing Order entered by Administrative Law Judge John D. Clark should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1996.

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BOARD MEMBER

c: Roger E. McClellan, Wichita, KS  
P. Kelly Donley, Wichita, KS  
John D. Clark , Administrative Law Judge  
Philip S. Harness, Director